IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1936

No. 878

GREAT NORTHERN RAILWAY COMPANY,
Appellant,

vs.

STATE OF WASHINGTON,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

(184 Wash. 648, 52 Pac. (2d) 1274)

PETITION FOR REHEARING

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Comes now the appellee by its attorneys of record herein and moves and petitions the court that the decision of the court in this cause rendered herein on the first day of February, 1937, be set aside and that counsel be granted leave to re-argue the cause on the merits.

Our reason for making this petition for a rehearing is our firm belief that the decision of the court is wrong. In accusing the court of error we also accuse ourselves of not properly presenting the case for had the case been properly presented and argued surely the court would have reached a proper conclusion.

ISSUES

In the trial court, upon defendants' objection to testimony as to the number of persons employed by the department of public works of the State of Washington, the following occurred: (R. 64-65)

"MR. HANNAN: I object to that, your Honor please, as being incompetent, irrelevant, and immaterial. The number on pay rolls in the various departments is immaterial in the matter. I object to the introduction of the testimony.

"THE COURT: It seems to me the objection is well taken. The only thing we are interested in here is whether this amount that is collected is in excess of necessary *inspection* fees.

"MR. DAPONTE: No, Your Honor, that isn't the question we have here. We aren't going into that except as shown by the record. Our position is that this is a flat fee levied to pay all of these activities, and that is an invalid act on its (Fol. 84) face. It is supplementary to that, and I doubt if it is necessary to my contention, but I thought for reenforcing the argument, it would be necessary to show that. I am not going into the cost of regulating railroads. It couldn't be proven. There are no records available.

"THE COURT: All right."

Again, in the trial court, one of appellant's attorneys, Mr. daPonte, objected to testimony offered by defendant as to the cost of regulating the railroads and in open court stated as follows:

"My contention is that the law is invalid on its face, is the point I made, and I didn't go into the cost of operating railroads, or the way it is distributed, or the expense." (R. 82)

The above quoted statements amount to a waiver of all points but the claimed invalidity of the statute. No other issue was presented. In the face of such statements by appellant's counsel in the trial court, when this court arrived at the conclusion that the law was not void on its face, the inquiry should have been considered closed, the controversy at an end and the judgment of the supreme court of the State of Washington affirmed. No other logical course was open. All further discussion was superfluous and may have caused the court to mislead itself.

REGULATION AND INSPECTION

The case at bar involves the inspection laws of neither the State of Washington nor of the United States. The inspection clause of the United States constitution was not pleaded. In spite of some loose expression such as regulation and inspection by the trial court the case was not tried as involving inspection laws. "Inspection" was injected into the case in the brief and argument drawn by appellants and signed by the trial court under the guise of findings and conclusions to make use of the case of *Foote v. Stanley*, 232 U. S. 494, 58 L. Ed. 698, which is not in point. Manifestly cases on inspection laws are useful only for illustration and comparison. Controlling the present case by the *Foote* case puts the *Foote* case on the wrong foot. The case at bar is controlled by *Charlotte C. & A. R. Co. v. Gibbes*, 142 U. S. 386, and similar cases.

There is a vast difference between the state's inspection charges, the surplus of which belongs to the federal government under the United States constitution, and the state's charges for regulation in the exercise of its police power which charges are reflected in rates and thereby returned to the utility regulated. The rules of the one are not applicable to the other.

BURDEN OF PROOF.

Neither is the *Foote* case nor other cases cited in the opinion in point on the burden of proof and its assumed shift upon the state, when the facts and issues are analyzed. In the *Foote* case the statute ordered and the pleadings admitted the illegal expenses paid out of the inspection fund. No such situation presents itself in the case at bar. When speaking on this subject and referring to the testimony of the department's auditor this court, in its opinion, made the following statement:

"* * * At the close of plaintiff's case, the defendant recalled the auditor as its own witness. He testified that the disbursements chargeable to the railroads for the period 1929 to 1933, inclusive, exceeded the receipts from railroads in the same period by $37,833. He did not, however, qualify what he had previously stated, that, in making up these figures, he had lumped all railroad charges, whether for inspection and regulation or interstate commerce cases or reparation cases. * * *."

The facts that the witness had "previously stated" are found in the record at pages 68 and 69. They merely show no segregation of expenses between the I. C. C. cases, rate hearings and reparation cases. Such commingling, when properly analyzed under the state law and the decisions of this court, cannot shift the burden. The I. C. C. has jurisdiction of intrastate rates and regulations when necessary to the regulation of interstate commerce. In such cases the participation of the state department is surely lawful. Reparation matters, when involv-

ing intrastate overcharges and intrastate rate hearings, are also within the state jurisdiction. There being no testimony showing that any of the expenses were outside of this legal field, the now unrebuttable presumption must be that all were valid and within the state's authority.

This court is bound by a state's court construction of state laws. The Washington public service law is restricted to intrastate matters. In construing that law in the case of *State ex rel. Chicago, Milwaukee & St. Paul R. Co. v. Public Service Commission*, 94 Wash. 274, a case we failed to cite in our brief, the state supreme court used at page 289 the following language:

"* * * But appellant argues that the language of the rule is broad enough to apply to cars ordered for both kinds of commerce, and that therefore the court cannot construe either it or the law as not intended so to apply. Such an argument, if applied to each of the various provisions of our railroad commission law, would defeat many of them as attempts to invade the power of Congress to regulate interstate commerce. Many of these provisions, standing alone, are couched in language broad enough to cover both kinds of commerce. But inasmuch as the dominant purposes of the act, to be gathered from all of its provisions, was merely to regulate intrastate commerce, it seems to us but reasonable to hold that this dominant purpose should be read into all of its provisions. * * *."

Applying the above to the case at bar any activity beyond an intrastate regulation is unauthorized. Any endeavor to do so would be

merely an unauthorized or unlawful act by the state officers and would not bind the state. If a violation of law makes the violated law invalid all laws are void and nothing but anarchy can exist. This court has never approved of such a doctrine but has always taken the opposite position. In the case of *Clark v. Poor*, 274 U. S. 554, in discussing this point, the court said:

"* * * It is said that all of the tax is not used for maintenance and repair of the highways; that some of it is used for defraying the expenses of the commission in the administration or enforcement of the act; and some for other purposes. This, if true, is immaterial. Since the tax is assessed for a proper purpose and is not objectionable in amount, the use to which the proceeds are put is not a matter which concerns the plaintiffs."

Appellant had the right to try its cause as it saw fit. It chose to waive all points but the claimed invalidity of the statute taken at its face value. (R. 65-65 and 82, *supra.*) That restriction of the issues the court has evidently overlooked or underestimated in rendering its opinion; but the dissenting opinion alludes to it though it was not properly stressed in appellee's brief. (Brief of Appellee, 30-31.)

The case at bar is of great importance to the State of Washington and every other state in the Union. It is vital to an understanding of our system of government by duel sovereignty. The time is not yet when the states are only sections of the

Union nor have they yet lost their police power and sovereignty over matters within their border.

Furthermore, the United States constitution does not contemplate such a result. Nowhere does it authorize or allow the federal government to dictate rules of evidence and procedure to enforce the police power of the state. To do so would cause a destruction of state sovereignty and also the Union, for a destruction of the units must of necessity work a destruction of the Union. This court has always frowned upon such attempts of Congress. It will be equally zealous in protecting state sovereignty from its own acts.

In view of the foregoing we respectfully petition and pray for a rehearing and re-argument of the issues in this cause.

Respectfully submitted,

G. W. HAMILTON,
Attorney General,

GEO. G. HANNAN,
Assistant Attorney General,

Attorneys for Appellee.

STATE OF WASHINGTON }
County of Thurston } ss.

We, G. W. HAMILTON, Attorney General, and GEO. G. HANNAN, Assistant Attorney General, and each of us hereby certify that the above and foregoing petition for rehearing in the above entitled cause is submitted and presented in good faith and not for delay.

G. W. HAMILTON,
Attorney General,

GEO. G. HANNAN,
Assistant Attorney General,

Attorneys for Appellee and Petitioner.